Supreme Court, U.S.
FILED

No. 94-1713 APR 18 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

WILBUR HARPER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

DENNIS L. BAILEY
Counsel of Record
301 W. Third St., LL
Dayton, OH 45422
513-225-4652

and

VICTOR A. HODGE
367 W. Second St.
Suite 110
Dayton, OH 45402
513-461-0009

Counsel for Defendant-Petitioner Wilbur Harper

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. QUESTION PRESENTED FOR REVIEW

Does the failure of the trial court to provide a cautionary instruction, "not to talk about the case with each other," at the various recesses during a trial violate a defendant's right to a fair trial and due process of law in a criminal case as guaranteed under the Fifth Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

I. QUESTION PRESENTED FOR REVIEW i

Does the failure of the trial court to provide a cautionary instruction, "not to talk about the case with each other," at the various recesses during a trial violate a defendant's right to a fair trial and due process of law in a criminal case as guaranteed under the Fifth Amendment to the United States Constitution?

II. OPINIONS BELOW 1

III. JURISDICTION 2

IV. STATEMENT OF THE CASE 2

V. REASONS FOR GRANTING THE WRIT 4

VI. CONCLUSION 6

APPENDIX ..... App. 1

Opinion of the Court of Appeals for Montgomery County, Ohio, dated August 12, 1994 ..... App. 1

Final Entry of the Court of Appeals for Montgomery County, Ohio, dated August 12, 1994 .. App. 10

Entry of the Supreme Court of Ohio, dated January 18, 1995 ..... App. 12

TABLE OF AUTHORITIES

Page

CASES

Jeffries v. Blodgett, 771 F. Supp. 1520 (W.D. Washington 1991) 5

State v. Cox, 42 Ohio St. 2d 200 (1975) 4

United States v. Parker, 997 F.2d 219 (6th Cir. 1993) 5

CONSTITUTION

Fifth Amendment, United States Constitution 5

STATUTES

Ohio Revised Code Section 2945.34 4

No. _____

In The

Supreme Court of the United States

October Term, 1994

WILBUR HARPER,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Montgomery County, Ohio, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Wilbur Harper, prays that a writ of certiorari issue to review the judgment of opinion of the Court of Appeals for Montgomery County, Ohio, Second Appellate District, entered in this proceeding on August 12, 1994.

II. OPINIONS BELOW

The opinion of the Court of Appeals for Montgomery County, Ohio, appears in the Appendix to this petition. The Appendix also includes the Decision and Entry by

the Supreme Court of Ohio, denying certiorari, dated January 18, 1995.

III. JURISDICTION

The Court of Appeals for Montgomery County, Ohio, rendered its Opinion on August 12, 1994. Also on August 12, 1994, the Court of Appeals for Montgomery County, Ohio, filed a Final Entry of Judgment pursuant to that Opinion. Subsequently, the Petitioner filed in the Supreme Court of Ohio a Memorandum in Support of Jurisdiction, pursuant to a Notice of Appeal that had been timely filed with the Court of Appeals for Montgomery County, Ohio. The Supreme Court of Ohio denied leave to appeal on January 18, 1995.

The jurisdiction of this honorable Court is invoked under 28 U.S.C. Section 1257(a).

IV. STATEMENT OF THE CASE

This case is a one-on-one alleged rape with no physical evidence and conflicting accounts having been given by the accuser, Tamesha Watkins. Both the accused, Wilbur Harper, and the accuser testified at trial.

On September 8, 1992, between 6:00 to 6:30 P.M., a girl, Tamesha Watkins, came in to Ray's Drive Thru in Dayton, Ohio. She was crying, but not loudly nor hysterically, and was asking for her mother. Her clothes were normal, not disheveled; and nothing unusual appeared about her hair. Miss Watkins told the police officer who

responded to the scene that a man in a red Nissan with a black bra, a sun roof, and license plate number CYZ 810, pulled her into his car and forced her to engage in oral sex, fondled her breasts, and fondled her vagina. At a different location the man attempted to have vaginal intercourse with her.

She described the assailant as a black male, age 30, with a beard, mustache, and short hair. She gave no indication as to the approximate height or weight of the assailant. She first stated he let her out at one location, she later stated he let her out at a different location.

At trial the police officers testified that they understood Miss Watkins' description to mean that her assailant had a full beard; they, however, attempted to argue that Miss Watkins may have meant a "shadow" instead of a full beard. At trial, Miss Watkins also used the word "shadow," for the first time. Similarly, at trial Miss Watkins changed her description of the car to "burgundy" rather than "red."

The medical evidence from the rape kit was negative for the presence of semen and/or sperm. Nothing of evidentiary value was obtained from the pubic hair combings, the fingernail scrapings, or the clothing of Miss Watkins.

V. REASON FOR GRANTING THE WRIT

Ohio law requires the trial court to instruct the jury at various recesses not to discuss the case among each other until the case is finally submitted to them. Ohio Revised Code Section 2945.34 provides:

> If the jurors are permitted to separate during a trial, they shall be admonished by the court not to converse with, nor permit themselves to be addressed by any person, nor to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them.

Recess instructions have been formulated to comply with the statute. *See*, 4 O.J.I. 402.25. One function of this statute and its corresponding jury instruction is to promote the orderly and fair administration of justice and to protect the parties' constitutional right to a fair trial and to due process of law. This statute has been interpreted by the Ohio Supreme Court to be mandatory. *State v. Cox*, 42 Ohio St. 2d 200 (1975). In *Cox*, the Ohio Supreme Court stated:

> The importance of cautionary instructions is evident from sections of the Revised Code which set forth a *statutory mandate* that the court give such instructions at specific times during the trial. See R.C. Sections 2945.33 and 2945.34. (emphasis added).

Id., 42 Ohio St. 2d at 207-208.

In *Cox*, the Ohio Supreme Court found no reversible error where the trial court had "adequately and repeatedly" cautioned the jury during the trial. This holding suggests that substantial compliance with the statute is

adequate to satisfy the statutory mandate. In the instant case, however, the trial court gave no admonitions at any of the recesses. This failure of the trial court to admonish the jury to not discuss the case during the various recesses throughout the course of a three-day trial denied Petitioner his right to a fair trial and to due process of law as guaranteed under the Fifth Amendment to the United States Constitution. Although the failure to so instruct the jury once or twice might satisfy this requirement through substantial compliance, the absolute failure to so instruct the jury prejudices the Defendant's right to a fair trial.

Improper jury instructions in a state criminal trial may be the foundation for a claim of a violation of a federal constitutional right to due process of law. *Jeffries v. Blodgett*, 771 F. Supp 1520 (W.D. Washington 1991). Similarly, cumulative errors may become a violation of due process of law, even when the individual errors in themselves would be harmless. *United States v. Parker*, 997 F.2d 219 (6th Cir. 1993). As the United States Court of Appeals for the Sixth Circuit stated:

> There were four errors below that cumulatively necessitate reversal of the convictions. Taken in isolation, these errors may be considered harmless. . . . After examining them together, however, we are left with the distinct impression that the due process was not satisfied in this case.

997 F.2d at 221 (citations omitted). Thus, while the omission of the recess instruction on one or even two occasions might be considered substantial compliance with the statute and harmless error, the absolute failure to

provide the required recess instruction to the jury constitutes plain error and a substantial violation of the defendant's right to due process of law as guaranteed under the Fifth Amendment.

VI. CONCLUSION

Petitioner submits that the trial court's failure to follow the requirements of the statute denied him a fair trial. Petitioner asks this Court to exercise its jurisdiction over matters raised under the rubric of the United States Constitution and grant certiorari in this matter so the issue may be fully briefed and argued.

Respectfully submitted,

DENNIS L. BAILEY
Attorney of Record
301 W. Third St., LL
Dayton, OH 45422
Telephone: 513-225-4652

Attorney for Defendant-Petitioner, Wilbur Harper

IN THE COURT OF APPEALS FOR
MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 13912
vs.	:	T.C. Case No. 92-CR-2529
WILBUR EARL HARPER	:	
Defendant-Appellant	:	

OPINION

Rendered on the 12th day of August, 1994.

Mathias H. Heck, Jr., Prosecuting Attorney, Walter F. Ruf, Asst. Prosecuting Attorney, 41 N. Perry Street, Suite 315 – Appellate Division, Dayton, Ohio 45402, Atty. Reg. No. 0020045

Attorney for Plaintiff-Appellee

Victor A. Hodge, 367 W. Second Street, Suite 110, Dayton, Ohio 45402, Atty. Reg. No. 0007298

Attorney for Defendant-Appellant

GRADY, P.J.

Defendant Wilbur Earl Harper appeals from his convictions for Rape, Attempted Rape, and Kidnapping. Harper was sentenced to serve concurrent sentences on the Rape and Attempted Rape. The Kidnapping conviction

was merged with the conviction for Attempted Rape because they are allied offenses of similar import.

Harper's convictions were founded on the accusations of Temesha Watkins, who claimed that on September 8, 1992, Harper forced her into his car and compelled her to engage in sex with him. Watkins' claims were not corroborated by independent evidence.

Defendant-Appellant Harper presents four assignments of error, which are set out below.

I.

APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL AS A RESULT OF THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AT RECESSES AS REQUIRED BY R.C. 2945.34.

The Trial lasted two and one-half days. At the conclusion of the sessions on the first and second days, the court permitted the jurors to leave court until the next morning. On neither occasion did the court admonish the jury as required by R.C. 2945.34, which provides:

> If the jurors are permitted to separate during a trial, they shall be admonished by the court not to converse with, nor permit themselves to be addressed by any person, not to listen to any conversation on the subject of the trial, nor form or express any opinion thereon, until the case is finally submitted to them.

Defendant-Appellant Harper concedes that his trial counsel failed to object to the court's failure to comply with R.C. 2945.34, and that he has no evidence that any

juror behaved contrary to the rules incorporated in the statute. In that event, the court's failure does not constitute reversible error. *Wagner v. State* (1922), 104 Ohio St. 38. *State v. Williams* (1974), 39 Ohio St.2d 20.

The first assignment of error is overruled.

II.

APPELLANT'S CONVICTION IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

In reviewing either the weight or sufficiency of the evidence supporting a criminal conviction, the same test is applied. Our function is to examine the evidence admitted at trial and to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *Id.* An appellate court abuses its discretion by substituting its judgment for that of the trier of fact as to the credibility of witnesses. *State v. Walker* (1978), 55 Ohio St.2d 208.

Temesha Watkins testified that on September 8, 1992, a man seated in an automobile parked in a lot off Norman Avenue, in Dayton, called to her as she walked past, on her way home from school. The man asked whether she had change for a quarter. Watkins got out the change. The man motioned to her to come to the passenger side of the car. When she did, the man opened the front passenger

door, grabbed her wrist, and told her in a deep voice to get in. She complied.

Once she was in the car, the man began making sexual overtures to Watkins, and told her that if she massaged his thigh he would let her go. When she did, the man moved her hand to his penis, to rub it. He removed his penis from his trousers and asked Watkins to perform Fellatio. She refused. He then grabbed the back of her head and forced her to.

After releasing his grip on Watkins head, the man started the car and drove to another location, in an alley near Salem Avenue. He put Watkins in the back seat, locked the car, and engaged in sexual intercourse with her. Afterwards, the man drove to Catalpa and Fairview, where he released Watkins.

As her assailant drove away, Watkins took note of the license number on the car. Watkins walked into a drive-through on the corner, crying. Her mother was called, and took her home. Watkins and her mother were later interviewed by police. Watkins was also examined by a physician.

Police took a report form [sic] Watkins, who gave a description of her assailant, whom she did not know. She also described his car, red, four door Maxima sedan, and gave police its license number. Defendant Harper was apparently connected to the crime through his car.

Temesha Watkins was fifteen years old when these events occurred. Defendant Harper, whom Watkins identified through a photospread and in open court at trial as her assailant, was thirty years old at the time.

Defendant Harper testified and denied any contact with Watkins. He claimed that he had worked on that day, and that he went directly home after work.

A physician who had examined Watkins after the alleged rape testified that she found no evidence of sexual activity. A police detective assigned to the Miami Valley Regional Crime Laboratory testified that the sexual assault kit used by that office reflected negative results for semen and/or sperm tests.

Defendant-Appellant Harper argues that Watkins' testimony was somewhat contradictory on several points. She described the car as being "red", and on another occasion as "maroon", and at trial as "burgundy" in color. Also, she told police that her assailant had a beard, but later said that he had a "shadow" of facial hair. The sequence of events and some of the particulars of the sexual assaults alleged also varied somewhat. These discrepancies, along with the lack of any independent physical evidence, render her testimony less than credible, according to Appellant Harper.

One-on-one allegations of this kind must be given careful scrutiny, and we have no reason to doubt that juries do that. The claimed discrepancies, if they have any force at all, go to the credibility of Watkins' testimony. That is an issue for the jury, not for an appellate court on review. *State v. DeHass* (1967), 10 Ohio St.2d 230.

The jury must resolve any conflicts in deciding whether to believe a witness. The jury apparently found any conflicts in Watkins' story insubstantial, for it chose to believe Watkins story and reject the Defendant's. We

may not interfere with that determination, even were we to believe that the jury was mistaken.

Defendant-Appellant Harper also argues that hearsay evidence given by a police officer concerning what Watkins' mother told the officer about Watkins' statements to her undermine the verdict. However, no objection was made to this evidence, and for purposes of appeal all error arising from it, other than plain error, is waived. *State v. Williams* (1977), 51 Ohio St.2d 112. "Plain error" does not exist unless it can be said that but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long* (1978), 53 Ohio St.2d 91. We cannot find that to be the case here.

Finally, Defendant-Appellant argues that the evidence of force was insufficient to support convictions for Rape and Attempted Rape. We do not agree.

Force is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2901.01(A). The force necessary for Rape does not require a direct or violent act, and it need not be physically overwhelming. It can be compelling, subtle, or psychological. If the victim's will was overpowered by force or duress, the force element of Rape is established. In weighing that evidence, the jury may look to the relative age, size, and strength of the persons involved. *State v. Eskridge* (1988), 38 Ohio St.3d 56.

The record demonstrates that Temesha Watkins was fifteen years old when the offense occurred. Defendant Harper was thirty years of age. He used force to pull her into his car, to hold her head in fellatio, and in locking

her into the car during sexual intercourse. The proof of force was not insufficient.

The second assignment of error is overruled.

III.

APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant-appellant argues that his trial counsel provided constitutionally ineffective assistance because he (1) failed to move to suppress the photospread from which Watkins identified him and (2) failed to object to the police officer's hearsay evidence, which was discussed above.

In *State v. Bradley* (1989), 42 Ohio St.3d 136, the Supreme Court held, at Syllabii 2 and 3:

> 2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* (1976), 48 Ohio St.2d 391, 2 0.0.3d 495, 358 N.E.2d 623; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, followed.)
>
> 3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.

Defendant-Appellant argues that a motion to suppress the photospread identification was proper because Watkins had first said that her assailant had a full beard, while the photos used were of men, including Harper, who were without facial hair. However, officers suspected Harper based on other information, which connected him to the offense through his car. We see no basis to suppress the photospread identification for the reasons suggested.

We agree that the police officer's testimony introduced hearsay-on-hearsay, and that it was objectionable. However, it varied from Watkins' later trial testimony, and defense counsel may have wished to have the jury hear it in order to argue that Watkins told conflicting versions of what had happened to her. A strong presumption operates in favor of trial counsel's adequate performance, and trial counsel is afforded considerable latitude in making tactical choices. *Strickland v. Washington, supra.* There is sufficient reason to conclude that is what occurred here.

The third assignment of error is overruled.

IV.

APPELLANT WAS DENIED A FAIR TRIAL AS A RESULT OF THE CUMULATIVE EFFECT OF ERRORS.

The only error we have found was in admission of the police officer's double-hearsay testimony. We do not

find this error sufficiently serious to have denied Appellant his right to a fair trial.

The fourth assignment of error is overruled.

V.

Having overruled all the assignments of error, we will affirm the judgment of the trial court.

FAIN, J. and KERNS, J., concur.

(Judge Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, sitting by Assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Walter F. Ruf, Esq.
Victor A. Hodge, Esq.
Hon. Lee A. Bixler
Hon. John W. Kessler

IN THE COURT OF APPEALS
FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. Case No. 13912
vs.	:	T.C. Case No. 92-CR-2529
WILBUR EARL HARPER	:	
Defendant-Appellant	:	**FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 12th day of August, 1994, the judgment of the trial court is Affirmed.

/s/ Thomas J. Grady
THOMAS J. GRADY,
PRESIDING JUDGE

/s/ Mike Fain
MIKE FAIN, JUDGE

/s/ Joseph D. Kerns
JOSEPH D. KERNS, JUDGE

(Judge Joseph D. Kerns, Retired from the Court of Appeals, Second Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

Copies mailed to:

Mathias H. Heck, Jr.
Prosecuting Attorney
Walter F. Ruf
Asst. Pros. Attorney
41 N. Perry Street
Suite 315 – App. Div.
Dayton, Ohio 45402

Victor A. Hodge, Esq.
367 W. Second Street
Suite 110
Dayton, Ohio 45402

Hon. Lee A. Bixler
Darke County Courthouse
Greenville, Ohio 45331

Hon. John W. Kessler
41 N. Perry Street
Dayton, Ohio 45422

The Supreme Court of Ohio

1995 TERM

To wit: January 18, 1995

State of Ohio, Appellee,	:	Case No. 94-2032
v.	:	ENTRY
Wilbur Earl Harper, Appellant.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court denies leave to appeal and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fee, $40.00, paid by Victor A. Hodge.

(Montgomery County Court of Appeals; No. 13912)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice